

Project Delays/Wrongful Termination: Eighth Circuit Court of Appeals Addresses Construction Dispute Related to White River Pumping Station Construction



Walter Wright, Jr.

wwright@mwlaw.com

(501) 688.8839

08/24/2018

Co-Author: Tucker Brackins

The United States Court of Appeals for the Eighth Circuit (“Court”) addressed in an August 17th opinion a contract dispute between a general contractor and a subcontractor working to construct an Arkansas pump station for the United States Army Corps of Engineers (“COE”). See *Randy Kinder Excavating, Inc. v. JA Manning Constr. Co.*, No. 17-2886, 2018 WL 3733034 (8th Cir. Aug. 7, 2018).

Randy Kinder Excavating, Inc. (“Kinder”) and J.A. Manning Construction Co. (“Manning”), were awarded a contract from the COE to construct a pump station on the lower White River in Arkansas.

Kinder (the general contractor) hired Manning (the subcontractor) to build a mechanically stabilized earth wall (“MSEW”) at a cost of \$950,000.

The MSEW suffered delays. They were stated to be caused almost entirely by Kinder. Manning was forced to purchase materials from a different supplier than it had originally planned.

The product provided by this supplier did not meet either COE or Kinder specifications. Kinder terminated its agreement with Manning. It ordered Manning to suspend operations.

Manning had already constructed over half of the MSEW. Kinder sued alleging breach of contract. Manning counterclaimed for wrongful termination.

The United States District Court for the Eastern District of Arkansas held in favor of Manning. Kinder argued on appeal that Manning committed the first material breach when it failed to either pay its suppliers or obtain “stamped” shop drawings for the MSEW.

The Court assessed whether a subcontractor committed material breach of a contract by applying five factors found in the Restatement (Second) of Contracts. Further, it applied Missouri law. For a breach to be considered material (thus excusing the other party’s performance), the court held it must examine:

1. The extent to which the injured party will be deprived of the benefit which he reasonably expected;

2. The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
3. The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
4. The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
5. The extent to which the behavior of the party failing to perform or to offer to perform comports with the standards of good faith and fair dealing.

The Court found that each factor weighed against a finding of materiality. It addressed each in turn.

The Court noted that, because Kinder was not deprived of any benefit by Manning's alleged failure to pay its supplier (even if this allegation were true), the first two factors weighed heavily against materiality.

The Court also found that the third factor weighed against materiality because Manning would suffer forfeiture if its breach were considered material. The goods the suppliers were providing Manning were custom and it would not be able to use them on another job.

The fourth and fifth factors also weighed heavily against materiality. The basis for this conclusion was Manning's attempt to perform its duties despite deliberate delays and threats of termination from Kinder.

The Court also noted that Kinder's "first to breach" argument would have failed even if Manning would have been found to be in material breach. A party waives the ability to object to a breach if it continues to accept the benefits of the contract. Kinder continued to accept Manning's performance for four months after the alleged breach. Kinder would have almost certainly have been barred from objecting, had the breach been material.

A [copy of the opinion](#) can be downloaded here.